No. 84-1077

In the Supreme Court of the United States

OCTOBER TERM, 1985

HAROL WHITLEY, et al.,

Petitioners,

v.

GERALD ALBERS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

I. ALBERS HAS FAILED TO DEMONSTRATE THAT, UNDER A CORRECT FORMULATION OF THE EIGHTH AMENDMENT STANDARD, HE WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT.

There is very little common ground in the positions taken by the parties and their respective amici in this case.[1] We disagree with Albers on the realities of the situation confronted by defendant prison officials; we disagree on the applicable constitutional standard by which to test the decision to use force; and we disagree on the role juries should play in reviewing the judgments of prison officials who respond to prison security crises.

Any surface appeal of Albers' arguments evaporates when his support for them is scrutinized. His description of the events surrounding the riot paints an image of a minimally disruptive or dangerous setting, but the picture inappropriately is drawn from misleadingly selective references to the record. Albers' proposed constitutional standard disregards relevant principles and precedent, and neglects important policy-based concerns that should inform resolution of this issue. He argues for permitting juries subjectively to reassess the desirability of official security measures when this Court has disapproved of judges engaging in identical inquiries. Although Albers is not so bold as to state it directly, his position calls on this Court to recast the values of the

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[1] The Correctional Association of New York and the Pennsylvania Prison Society jointly have filed an amicus curiae brief supporting Albers. The United States Solicitor General has filed a brief as amicus curiae supporting the State of Oregon.

Eighth Amendment. Ultimately, he would permit the wisdom of nearly every prison security decision to be arbitrated by a jury, which may base liability on its choice between competing penological philosophies and theories, or its hindsight determination of what action might have been "best."

A. The facts recited by Albers place a misleading gloss on the difficult, split-second decisions prison officials were required to make in this prison security emergency.

The central theme of Albers' brief is that, viewed in the light most favorable to him, this is a case of a wholly unjustified shooting of a nondangerous inmate. Albers describes himself as a model prisoner and an innocent bystander assisting the administration at the time he was shot. He creates an image of an essentially calm cellblock in which "honor" inmates were milling around harmlessly and posing no danger. Richard Klenk, he asserts, was the sole, out-of-control inmate and therefore the only inmate whose action should have concerned officials when they attempted to regain control.

An unsanitized review of the undisputed facts reveals a very different picture, one that more accurately highlights the risks, uncertainties and dangers that confronted the institution officials. True, these were honor block inmates. But that means only that these inmates, while in the tightly controlled environment of this maximum security institution, had not broken any disciplinary rules for six months. (Tr. 102).[2] The cellblock was still a maximum security area, and the inmates housed there were maximum security prisoners. In short, the inmates in A Block were violent, dangerous felony offenders

[2] In this brief, "Tr." refers to the transcript of the trial.

who did not inspire trust, especially when tight institutional controls were not in place.[3]

Contrary to Albers' characterization, Richard Klenk was hardly the only armed or out-of-control inmate. Many if not most of the inmates, including Albers, knowingly refused the cell-in order.[4] (Tr. 104, 187-88). Several inmates wreaked wholesale destruction of furniture, glass and mirrors on the block until all of the property readily available was, to use Albers' own description, "demolished." (Tr. 140; *see generally* Tr. 104-05, 159, 210). According to Albers and the inmate witnesses, a fight among three inmates left one of them lying on the floor, incapacitated and bleeding, (Tr. 107); inmates had armed themselves with pieces of broken furniture, and Albers speculated they did so to protect themselves from other inmates, (Tr. 108); another inmate believed that some armed themselves for their own protection, while others armed themselves so they could join in, (Tr. 530); in general, the inmates were tense, abnormally aggressive, and visibly fearful, (Tr. 113, 172); inmates in the block feared each other as well as staff, (Tr. 168-69); one inmate candidly acknowledged he was afraid for his life, and it was other inmates, not staff,

[3] This reality is amply demonstrated by the criminal records of the A Block inmates called to testify. Their criminal convictions included assault with a dangerous weapon, sexual abuse, felony murder, murder, burglary and multiple convictions for escape, armed robbery, rape and sodomy. (Tr. 159, 180-81, 189, 222, 454, 521). Albers himself had prior convictions for drug activities, ex-convict in possession of firearms, first degree burglary, and both first and second degree escape; at the time of the riot, Albers was incarcerated for armed robbery. (Tr. 92, 149-52). Significantly, one of his escapes was from Oregon State Penitentiary. (Tr. 151).

[4] Albers emphasizes in his brief that he was *at* his cell during much of the riot. (*See* Resp. Br. at 4). This suggests he was *in* his cell, which is untrue. Throughout most of the disturbance, he was out on the tier with other inmates and was in violation of the cell-in order. Albers went into his cell only temporarily to take precautions to avoid the effects of tear gas. (Tr. 110).

whom he feared, (Tr. 522-23); and the inmate who "protected" Officer Fitts in cell 201 was concerned throughout the incident for the guard's safety and doubted his own ability to protect Fitts from the other 200 inmates on the block or from Klenk who was armed with a knife, (Tr. 170-71).

Also contrary to Albers' assertions, Richard Klenk was not the only inmate whom officials believed presented a danger. As Whitley testified, Klenk was his primary concern at the moment officials entered to free Fitts, because Klenk was known to be armed and expressly had threatened Fitts' life. (Tr. 231). But in a maximum security institution, every prisoner is considered potentially dangerous when inmates have taken control, as Whitley testified (Tr. 420-21) and as common sense would dictate. To suggest that under these circumstances Klenk either was or should have been the officials' only concern belies both the record and reason.[5]

The crucial events took place in twenty seconds or less. (Tr. 384). The prison officials carefully orchestrated their entry into the cellblock to regain maximum control in a minimum amount of time with minimum injury to staff, inmates and the hostage. With Klenk downstairs and away from the hostage cell, Whitley started over the barricade. Klenk turned and ran towards the cell where the hostage was held. (Tr. 376). Whitley literally hit the ground running (Tr. 232), and found himself in a foot race with Klenk to reach the cell. (Tr. 379). Kennicott, following Whitley, fired a warning shot just as Whitley started over. (Tr. 461). As Kennicott was climbing the barrier, some inmates

[5] Additionally, Klenk's representations to officials indicated that he was not acting alone and that he and his supporters were a threat to the lives of unpopular groups of inmates. Whitley testified: "[Klenk] made comments to that effect, that 'We're going to kill the goddamed 'rapos' and 'niggers,' and one 'rapo' has already been killed.' " (Tr. 372).

ran up the stairs ahead of Whitley; Kennicott fired a second shot which hit the post on the corner of the stairway. (Tr. 462). Whitley ran past Albers and headed up the stairs. Albers turned and started up the stairs after Whitley. Kennicott, in that split-second, had two choices: He could shoot low, pursuant to orders, and try to stop Albers from running up the stairs behind Whitley, or he could assume that Albers would run past cell 201 without harming Whitley or the hostage. Kennicott fired, hitting Albers in the knee. Whitley successfully got to cell 201 and tackled Klenk just as Klenk was lunging through the doorway and was within a foot and a half of the hostage. (Tr. 490). Whitley was back downstairs with Klenk in custody before the eighth guard in the lineup had gotten over the barricade and into the cellblock. (Tr. 417-18).[6]

The record in this case graphically illustrates a truth about maximum security institutions in general: They house extraordinarily dangerous people. When the tight controls normally in place are overthrown, the setting is volatile and the actions of inmates, both individually and collectively, are

[6] Albers inaccurately states that the defendant officials *knew* that the first warning shot would cause Albers to run up the stairs back to his cell. (Resp. Br. at 35). Whitley, who instructed Kennicott to fire a warning shot, wanted to alert inmates that they were coming in with force to get the hostage, and he wanted inmates to "disburse." (Tr. 236, 397). Whitley thought the inmates' reactions would depend on where they were at the time. (Tr. 240). He believed many of the inmates in the front area near the barricade would fall face down on the concrete or head into the nearby open offices and day room in response to the first shot. (Tr. 236, 406). Whitley had other officers behind Kennicott for the very purpose of protecting Kennicott and himself from an attack from behind by those inmates. (Tr. 236, 418). Whitley thought the most reasonable response of inmates in the front area would be to head for the day room, but he acknowledged the *possibility* that some of them might head up the stairs to go back to their cells. (Tr. 236, 400). He gave the order to shoot low at any inmate headed up the stairs because it also was possible that such an inmate would assist Klenk or attack Whitley from the rear. (Tr. 401).

difficult to predict. When Albers bolted up the stairs after Whitley, it was impossible for officials to know or find out whether his intentions were benign. Albers' position necessarily is that, because there had not been warnings and he had not demonstrated overtly that he was a threat, officials constitutionally were obligated to assume he would not harm Whitley or the hostage, and they constitutionally were required to ignore the distinct possibility that he would.

In effect, Albers seeks to have this Court close its eyes to the realities of a maximum security prison and to the risks and uncertainties inherent in restoring security where inmates have seized control. In other challenges to prison security measures this Court has been steadfast in its refusal to do so. The Court consistently has demanded that constitutional scrutiny accommodate the unique setting of a prison and give deference to the expertise of prison administrators. The gloss that Albers places on the facts of this case should not distract the Court from a realistic portrait of the inmates who were involved in this crisis and a realistic view of the dangers with which officials were confronted.

B. Albers' "balancing of values" and reasonableness analysis has no basis in Eighth Amendment principles or in this Court's jurisprudence.

1. Albers and his amici argue, in essence, for a constitutional standard based on "reasonableness." Under their analysis, the jury balances an inmate's interest in avoiding injurious force against the correctional purpose to be served by its use. An inmate's individual culpability and alternatives to force are considered in assessing the weight of the correctional purpose. If the jury believes some lesser amount of force would have sufficed, it may find that the force used was unconstitutionally excessive and it may impose damages liability. Despite his disclaimers, Albers' reasonableness standard reduces to a tort analysis and makes a jury issue of virtually any injury to an inmate inflicted by prison officials.

Albers' discussion and analysis of the relevant constitutional values and case law is at best perfunctory. He asserts that "[t]his Court's application of the cruel and unusual punishments clause has long rested on principles of balancing." (Resp. Br. at 23). He relies exclusively on cases involving disproportionality challenges to criminal sentences, when by his own acknowledgment this case is aligned with those involving Eighth Amendment challenges to treatment of prisoners during confinement.[7] (*See* Resp. Br. at 17-19).

Albers thus relies on inapposite cases. They also fail to support the analysis he advocates. Disproportionality is a legal question. Sentences are not invalidated on an *ad hoc* factual basis by juries; if they are invalidated at all, they are invalidated categorically and as a matter of law. Nor does disproportionality turn on subjective assessments that a lesser penalty would suffice, *see Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality); or on judicial disagreement with legislative judgments on the effectiveness of a criminal sanction, *id.* at 175-76, *Weems v. United States*, 217 U.S. 349, 378 (1910); or on some degree of excessiveness, however slight, *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (sentence must be *grossly* disproportionate for constitutional violation to arise). In short, a disproportionality inquiry into whether a category of crime should receive a certain sanction simply is not based

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[7] Albers also cites *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), and asserts that disproportionality analysis has been applied to prison condition challenges. *Rhodes*, however, merely cites in its discussion of general Eighth Amendment principles the same sentencing cases cited by Albers. *Rhodes* does not apply a disproportionality test. Such a test poses inherent difficulties and limitations in the context of conditions that apply uniformly to an entire population of inmates incarcerated for a range of criminal activities. We do not read *Rhodes* as support for individualized comparisons of the harshness of a condition of incarceration in relation to the nature of the crime warranting imprisonment.

upon the type of individualized "balancing" analysis that Albers advocates.

Albers' formulation forces him totally to disregard the holding in *Estelle v. Gamble*, 429 U.S. 97 (1976). *Estelle* explained the duty of prison officials to provide medical care to inmates, and the circumstances under which a breach of that duty rises to the level of "cruel and unusual" punishment. Then, as now, contemporary standards unquestionably required "reasonable" medical care, commensurate with the skill and training of the provider; breach of that duty was actionable malpractice.[8] But this Court soundly refused to transform societal obligations of reasonable care into an Eighth Amendment imperative. 429 U.S. at 105-07. The Court held that to establish a constitutional violation, an inmate must show that due to deliberate indifference and not an exercise of professional judgment, his serious medical needs went unmet.[9] *Id.* at 104-06 and n. 10.

Estelle implicitly makes the point that is central to our argument. The Eighth Amendment reflects a different value

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[8] *See generally* Prosser and Keeton on Torts, § 32, p. 185-93 (5th ed. 1984).

[9] We agree with the United States Solicitor General, who in his amicus brief points out the difficulty of the deliberate indifference standard where, as here, officials must take into account more than a single affirmative obligation. (Am. Br. at 21). Albers disclaims his ability to understand how the obligations of officials in this context are multiple or competing, but a hypothetical illustrates the point.

Assume that Kennicott, uncertain but suspicious of Albers' intentions in immediately following Whitley up the stairs, is deferential to his personal safety interests and does not use force to stop him. Instead of going to his cell, Albers assists Klenk in getting into cell 201. In the process, he and Klenk seriously or fatally injure one of the inmates trying to protect the hostage guard. In an effort to be solicitous of Albers' interests, have officials been "deliberately indifferent" to the guard's safety or that of inmates assisting in his protection? Under Albers' analysis, a jury could find that they were. Any action officials take thus subjects them to potential liability.

than do tort notions of the duty of reasonable care owed between individuals in society generally. Unlike tort law, the Eighth Amendment is not designed to allocate losses arising out of human activities by basing liability upon socially "unreasonable" conduct.[10] Instead, as we have already argued at length, the Eighth Amendment is an absolute limitation on government's authority to punish. It draws an outer boundary and reflects the value that punishment which clearly goes beyond the legitimate aims of our justice system, and is wantonly inflicted, is not to be tolerated.

The amicus brief filed in Albers' support thus misses the point with its lengthy discussion of statutes, model codes and administrative regulations restricting the use of deadly or injurious force to circumstances where it is reasonably necessary and where reasonable alternatives have been exhausted. Such a standard is unobjectionable as a matter of policy, as is a standard of "reasonable" medical care. But this Court has never held that the Eighth Amendment is violated whenever an inmate is seriously injured as a result of a breach of a duty of reasonable care. Nor should it.

Cruelty, wantonness, or an equivalent punitive component, are crucial elements of the constitutional calculus. Strikingly absent from the record and from Albers' factual argument is anything that points to "wantonness."[11] In this context, as in the context of medical care or

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[10] *Compare generally* Prosser and Keeton on Torts, § 1 (5th ed. 1984).

[11] Albers, in footnote 10 of his brief, makes a passing argument that Whitley's cry "Shoot the bastards" as he began his pursuit of Klenk, could suffice to show some kind of evil intent. He does not press the argument, for good reason.

First, to the extent Albers predicates a constitutional violation on the overall strategy of the officials, Whitley's statement has no bearing either on the formulation or the execution of that strategy. All orders were followed

(Footnote continued on next page)

psychiatric treatment, a complete failure to bring professional judgment to bear in responding to the riot would, we submit, equate with wantonness. *See Estelle v. Gamble*, 429 U.S. at 104-06 and n. 10; *cf. Youngberg v. Romeo*, 457 U.S. 307, 321-23 (1982). Facts suggesting that injuries were inflicted vindictively, purely for the sake of injuring, rather than to regain control of the cellblock, would evidence both wantonness and lack of justification. Albers has not claimed vindictiveness or retaliation, nor could he on this record. Furthermore, professional judgment unquestionably was brought to bear throughout the formulation of a plan to restore control and free the hostage, although others may in hindsight disagree with the decisions the officials made. There is no evidence of wantonness; indeed the only evidence on the point refutes the assertion that officials acted wantonly.

The best that can be said of Albers' case is that the responsible officials, in the exercise of their professional judgment, may have misjudged the risks, or may have been imprudent or unwise. Only in that sense can the actions be characterized as "excessive." The evidence at most established a jury question by tort standards. Under a correct Eighth Amendment standard there was nothing for the jury to decide.

2. The parties and our respective amici divide sharply in our identification of the legal standard to be applied. Underlying that disagreement, however, is a particu-

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exactly. To the extent Albers desires to have liability turn specifically on the use of force against him, only Kennicott's actions are relevant. Kennicott fired, consistent with previously given orders, because Albers pursued Whitley up the stairs toward the hostage cell.

Whitley's statement was not an "order" at all, despite Albers characterization of it as such. As Whitley testified, he yelled the statement at Klenk in an effort to scare him away from cell 201. The statement might have been relevant if the armed guards opened fire on everyone in response, contrary to previously given orders. But they did not.

larly fundamental dispute on the appropriate role of judges or juries in reviewing the judgments made and actions taken by the institution officials.

Despite Albers' persistent mischaracterization of our argument, we do not advocate a "riot exception" to the Eighth Amendment that would insulate prison officials from any judicial scrutiny. Judicial scrutiny clearly is appropriate. But the question of the proper scope of that scrutiny is important to ask and to resolve correctly.

Albers and his amici argue that the constitutional standard focuses on reasonably necessary force and exhaustion of milder alternatives. Even if they are correct, the question is still begged. Their argument does not address by what standard courts are to review the judgment of prison officials. This case squarely underscores the problem. There is no question that the responsible administrators held themselves to precisely the standard that Albers and his amici advocate. They based their decisions on the dangers as they perceived them; they attempted to determine what measures were reasonably needed; they considered and in some respects exhausted milder alternatives; they used force only where, in their judgment, the safety of others would have been unduly jeopardized had they not used force. The question never directly confronted by Albers or his amici is: Should judges or juries review the circumstances anew, determine for themselves what "reasonably" should have been done, and find liability if their opinion differs from that of the officials? Albers' answer is that they should. We adamantly disagree.

Albers essentially asserts that where reasonable minds can differ on the evidence, resolution of that difference is a "classic jury issue." (Resp. Br. at 25). But that is a tort standard, not one that flows from the Eighth Amendment. Eighth Amendment questions traditionally have been

legal inquiries for judges. Classically, under the Eighth Amendment, if reasonable minds can differ, they are entitled to differ, and challenged action must be upheld. *See, e.g.*, *Spaziano v. Florida*, 468 U.S. ___, 104 S.Ct. 3154, 3165 (1984) (the Eighth Amendment is not violated every time a state holds a minority view on how best to administer its laws). The existence of a remedy for damages under section 1983 does not alter that result. *Cf. City of Oklahoma City v. Tuttle*, 471 U.S. ___, 105 S.Ct. 2427, 2432 (1985) (42 U.S.C. § 1983 creates no substantive rights; it merely provides a remedy for deprivations of rights established elsewhere).

Albers also points to this Court's recognition in *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) that juries perform an important function in criminal cases by maintaining a link between contemporary community values and the penal system. To argue from this that juries, on a case-by-case basis, should decide all assertions of cruel and unusual punishment seriously distorts the point made in *Gregg*. The Court recognized only that, viewed collectively, jury verdicts in criminal cases provide some indicia of society's contemporary sensitivities. Certainly *Gregg* does not support the argument that discrete twelve-person juries so accurately reflect contemporary values that we should leave it to them to decide the constitutionality of a sentence imposed in a given case.[12] Such *ad hoc* demarcation of constitutional boundaries by lay persons is unsupported by any precedent.

Although Albers fails to discuss it, *Youngberg v. Romeo*, 457 U.S. 307 (1982) is particularly apposite. That case involved the due process liberty interests of persons involuntarily committed to mental institutions. This Court held that individuals so committed were entitled to "reasonable" conditions of safety and freedom from "unreasonable" restraints. *Id.* at 321-24. The decision underscores the dangers of allowing juries to second-guess institution officials in determining "reasonable" treatment. The Court was unwilling to leave that inquiry to the unguided discretion of a judge or jury because to do so would remove uniformity in protecting constitutional interests, *id.* at 321, restrict unnecessarily the exercise of professional judgment, *id.* at 322, interfere unduly with the operations of state institutions, *id.*, and inappropriately place the determination of "reasonable" treatment in the hands of judges and juries less qualified than professionals to make those judgments, *id.* at 323. The Court accordingly held that a jury, in reviewing a treatment decision, must give it presumptive validity if it was made by a qualified professional; liability can be imposed only if the decision so substantially departs from professional standards as to demonstrate that in fact it was not based on professional judgment. *Id.*

[12] Indeed, since *Gregg* this Court has held that a state is not constitutionally required to have a system in which the jury participates in the sentencing decision in capital cases. *Spaziano v. Florida*, 104 S.Ct. at 3164.

Although the context (mental institutions) and constitutional provision (Due Process Clause) are different, the concerns raised in *Youngberg* parallel in every way the concerns that have caused this Court to insist on limited judicial scrutiny of actions of prison officials challenged under the Eighth Amendment. Albers closes his eyes both to policy and precedent because, quite simply, he has no case if the jury cannot freely substitute its judgment for that of prison administrators.

C. Albers' independent due process claim is not properly before the Court and is incorrectly analyzed.

1. Albers urges that throughout the litigation below he raised an *independent* claim that the prison officials' use of force violated his due-process-protected liberty interests. He

therefore asks the Court to consider the application of the Due Process Clause apart from his Eighth Amendment claim.

Although Albers now independently analyzes the principles and precedent that might bear on a due process claim, he did not do so below. His allegations and arguments consistently joined his citations to the Eighth and Fourteenth Amendments in a way that suggested he merely recognized the Fourteenth Amendment Due Process Clause as incorporating the protections of the Eighth Amendment, thus making them applicable to the states.[13] The district court logically concluded that Albers was not asserting an independent due process claim. *Albers v. Whitley*, 546 F.Supp. 726, 732 n. 1 (D. Or. 1982).

In the Ninth Circuit, Albers merely reiterated the argument he made to the district court. (Appellant's Brief at 28-29). He did not argue that the district court erred in its conclusion; he did not assert that the Ninth Circuit should view his position differently. We expressly pointed out that he was not disputing the trial court's conclusion. (Appellee's Brief at 5 n. 2). We therefore did not brief the issue, and the Ninth Circuit panel did not consider it to be before them, *Albers v. Whitley*, 743 F.2d 1372, 1374 n. 1 (9th Cir. 1984). This Court accordingly should decline Albers' invitation to interject a new constitutional challenge into the dispute.

[13] Specifically, his trial memorandum stated:

> The constitutional prohibition against the use of excessive and unnecessary force joins together the Eighth Amendment's proscription of cruel and unusual punishment and the Fourteenth Amendment's principle of due process of law. *King v. Blankenship, supra*, at 72; *Beishir v. Swenson*, 331 F. Supp. 1227 (WD Mo 1971). The question is not solely whether corrections officials took action intended to be punishment in the traditional sense. Rather, when force is applied, even only as a response to a perceived danger, with the force exceeding what was necessary under the circumstances and causing substantial injury, the result reaches the dimension of cruel and unusual punishment and denies the injured person due process of law. *Id.*

Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at p. 4.

2. On its merits, Albers' argument must fail. For the limited purpose of our response to Albers' due process argument, we assume that the Due Process Clause extends independent substantive protections to lawfully incarcerated prisoners. Albers' analysis nevertheless completely misses the mark.

Nowhere in his due process discussion or elsewhere in his brief does Albers so much as cite *Bell v. Wolfish*, 441 U.S. 520 (1979) or *Block v. Rutherford*, 468 U.S. ___, 104 S.Ct. 3227 (1984). The omission is fatal: *Bell* and *Block* are concerned with due process protections for pretrial detainees, a context so analogous as to be nearly on point if a due process analysis is appropriate here. Those cases, however, squarely reject Albers' "balancing" approach. *E.g.*, *Block v. Rutherford*, 104 S.Ct. at 3234.

The superficiality of Albers' due process analysis is further highlighted by his failure to acknowledge the decision in *Youngberg v. Romeo*. In *Youngberg*, this Court expressly rejected the notion that a jury should be free to substitute its judgment for that of the officials on what constitutes "reasonable" treatment or restrictions in an institutional setting. Yet that would be precisely the consequence of the standard that Albers advocates.

The relevant due process test adopted by this Court deems a course of action chosen by a competent[14] professional to be presumptively valid. A professional's judgment will not be second-guessed by federal courts unless it is so far outside of

[14] Competence, in this context, refers to education, training or experience that qualifies the decision maker to make the particular decision at issue. *Youngberg*, 457 U.S. at 323 n. 30.

the range of professionally acceptable choices as to evidence either a failure to exercise professional judgment, *Youngberg v. Romeo*, 457 U.S. at 323, or an impermissible ulterior motive, *Bell v. Wolfish*, 441 U.S. at 539 and n. 20. If a complainant cannot demonstrate that the challenged action exceeds these limits, the court's inquiry must end. *Block v. Rutherford*, 104 S.Ct. at 3234.

This due process analysis fits comfortably with the Court's prior Eighth Amendment tests. The exercise of professional judgment in making a choice from a range of professionally acceptable responses is, by definition, neither deliberately indifferent nor wanton even if hindsight suggests a better choice. *Estelle v. Gamble*, 429 U.S. at 105-07. When, as in this case, it is uncontradicted that the administrators considered less drastic responses and rejected them for reasons which are not plainly frivolous, any suggestion of wantonness or deliberate indifference is refuted conclusively. A due process challenge to the use of force in this case, even if properly brought, would fail as surely as does Albers' Eighth Amendment claim.

II. ALBERS HAS FAILED TO PRESENT A CONVINCING ARGUMENT WHY DEFENDANT PRISON OFFICIALS SHOULD NOT BE IMMUNE FROM LIABILITY.

1. Albers asserts that the question presented in the petition for certiorari does not properly raise the issue of defendants' qualified immunity. His procedural objection is both ill-founded and untimely.

We carefully framed our question presented to encompass the dual legal issues raised, briefed, argued and decided at every level of the proceedings below. The question asks whether an Eighth Amendment violation is established by evidence satisfying the tort-like analysis announced by the Ninth Circuit, and also whether a violation found on the basis

of that standard would expose these officials to liability for damages. The language "so as to expose prison officials to liability for damages" is not mere surplusage. It fairly encompasses the qualified immunity issue extensively discussed in the petition for certiorari. Pursuant to Supreme Court Rule 21(1)(a), the statement of the question presented is "deemed to comprise every subsidiary question fairly included therein." Albers' argument accordingly is without merit.

Moreover, his protest at this late hour is not a fair or timely way to raise this point of procedure. The petition for certiorari fully developed our claim that the Ninth Circuit's ruling on the defense of qualified immunity was wrong and warranted review by this Court. In his brief in opposition to the petition, Albers did not assert that the qualified immunity issue was not fairly presented. The issue now has been fully briefed on the merits. If there is a procedural defect here, it should be deemed waived. *See City of Oklahoma City v. Tuttle*, 105 S.Ct. at 2432 (nonjurisdictional defects of this sort should be brought to the Court's attention *no later* than in the respondent's brief in opposition to the petition for certiorari).

2. In its resolution of the immunity issue, the Ninth Circuit Court of Appeals ignored the primary thrust of this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) by reinserting a subjective inquiry about petitioner's "good faith" into its immunity test.[15] Albers makes no attempt to defend the Ninth Circuit's decision, perhaps because the Ninth Circuit's approach is so obviously at odds with this Court's recent immunity case law. Albers instead attacks our immunity argument, but he does so by miscasting our posi-

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[15] In a recent en banc opinion, the Ninth Circuit cited its decision in this case for the proposition that an intentional deprivation of constitutional rights by state officials "can be excused when those officials, in the exercise of reasonable good faith, believe their action or inaction to be lawful." *Haygood v. Younger*, 769 F.2d 1350, 1358 (1985).

tion. Neither we nor the United States Solicitor General urges a standard for clear establishment of a constitutional right that requires factual identity. Our point is not that prison officials should be stripped of qualified immunity only if prior, "on all fours" case law constitutionally prohibits a particular type of official action. Our point is that, consistent with *Harlow v. Fitzgerald*, prison officials are entitled to delineation of the constitutional bounds of their conduct before they can be held liable for money damages.

Even if Albers correctly maintains that he had a clearly established constitutional right to be free from the use of "unreasonable, excessive or unnecessary deadly force," (Resp. Br. 43), he incorrectly asserts that these "standards" provided guidance to prison officials for application in this context. Indeed, a substantial part of Anglo-American law historically has been devoted to discerning the contemporary understanding of what is "reasonable" and "necessary." Even when "reasonableness" is the clearly established constitutional standard, refinement of that principle is a prerequisite to a deprivation of qualified immunity. For example, although the Fourth Amendment unquestionably prohibits "unreasonable searches," this Court recently recognized that the concept of an "unreasonable" search was not so self-evident that the Attorney General was required to predict that national security wiretaps would be found unreasonable. *Mitchell v. Forsyth*, ___U.S. ___, 105 S.Ct. 2806 (1985). In upholding the Attorney General's claim of qualified immunity, the Court perceived that when the constitutional limits of official action have yet to be set in a concrete standard (*e.g.*, no national security wiretaps without a warrant) the establishment of an imprecise constitutional standard (*e.g.*, no unreasonable searches) would not defeat a qualified immunity claim. A prior instructive application of

the imprecise standard in a similar factual setting was required. *See also Hobson v. Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984).

Respondent is blind to this point, and the Ninth Circuit either ignored or resisted it. The legal standard and precedents Albers relies upon are inadequate because they failed to give prison officials any guidance about the level of force that would be deemed "reasonable" in legitimately comparable circumstances. The district court judge and the Ninth Circuit dissenter grasped this point, and correctly concluded that defendant prison officials were immune from damages liability.

CONCLUSION

The decision of the Ninth Circuit should be reversed. The case should be remanded with instructions to reinstate judgment for petitioners that was issued by the district court.

Respectfully submitted,

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